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No. 80-497

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COLONEL PAUL EMMETT TOWRY,
Petitioner,

versus

THE UNITED STATES OF AMERICA,
HAROLD BROWN, SECRETARY OF DEFENSE,
THOMAS C. REED, DONALD H. RUMSFELD,
Respondents.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether petitioner can be precluded from judicial review of a patently arbitrary and capricious federal agency decision made pursuant to the Military Claims Act, 10 U.S.C. Sec. 2733 and the Foreign Claims Act, 10 U.S.C. Sec. 2734.

2. Whether arbitrary government action can be exempt from judicial review without express legislation proscribing such review.

3. Whether a civilian who is seriously injured as the result of the admitted negligence of the federal government must relinquish his constitutional and statutory rights in order to seek compensation from the negligent agency.

4. Whether petitioner has been deprived of a valuable property interest without due process of law in violation of the Fifth Amendment to the United States Constitution.

5. Whether petitioner's claim of violation of due process of law may be dismissed as barred by the defense of sovereign immunity.

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For the Fifth Circuit

PETITION FOR CERTIORARI

The petitioner, Colonel Paul Emmett Towry, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 3, 1980 inasmuch as the Court of Appeals has decided an important federal question in a

way in conflict with applicable decisions of this Court and in conflict with decisions by other federal courts.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit, reported at 620 F.2d 568 (July 3, 1980), appears in the appendix at A-17. The opinion of the trial court, the United States District Court for the Eastern District of Louisiana, is officially reported at 459 F.Supp. 101 (1978) and reproduced in the appendix at A-1.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 3, 1980, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1331 and 28 U.S.C. §2101.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The texts of the pertinent constitutional provisions and statutes are reproduced below, and when appropriate due to length, these statutory sections are provided in the Appendix:

1) Military Claims Act, Title 10, U.S.C., §2733:

"(a) Under such regulations as the Secretary concerned may prescribe, he, or, subject to appeal to him the Judge Advocate General of an armed force under his jurisdiction, or the chief legal officer of the Coast Guard, as appropriate, if designated by him, may settle, and pay in an amount not more than $25,000, a claim against the United States for —

(1) damage to or loss of real property, including damage or loss incident to use and occupancy;

(2) damage to or loss of real property, including property bailed to the United States and including registered or insured mail damaged, lost, or destroyed by a criminal act while in the possession of the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be; or

(3) personal injury or death;

either caused by a civilian officer or employee of that department, or the Coast Guard, or a member of the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be, acting within the scope of his employment, or otherwise incident to noncombat activities of that department, or the Coast Guard.

(b) A claim may be allowed under subsection (a) only if —

(1) It is presented in writing within two years after it accrues, except that if the claim accrues in time of war or armed conflict, or if such a war or armed conflict intervenes within two years after it accrues, and if good cause is shown, the claim may be presented not later than two years after the war or armed conflict is terminated;

(2) it is not covered by section 2734 of this title or section 2672 of title 28;

(3) it is not for personal injury or death of such a member or civilian officer or employee whose injury or death is incident to his service;

(4) the damage to, or loss of, property, or the personal injury or death, was not caused wholly or partly by a negligent or wrongful act of the claimant, his agent, or his employee; or, if so caused, allowed only to the extent that the law of the place where the act or omission complained of occurred would permit recovery from a private individual under like circumstances; and

(5) it is substantiated as prescribed in regulations of the Secretary concerned.

For the purposes of clause (1), the dates of the beginning and ending of an armed conflict are the dates established by concurrent resolu-

tion of Congress or by a determination of the President.

(c) Payment may not be made under this section for reimbursement for medical, hospital, or burial services furnished at the expense of the United States.

(d) If the Secretary concerned considers that a claim in excess of $25,000 is meritorious and would otherwise be covered by this section, he may pay the claimant $25,000 and report the excess to Congress for its consideration.

(e) Except as provided in subsection (d), no claim may be paid under this section unless the amount tendered is accepted by the claimant in full satisfaction.

(f) For the purposes of this section, a member of the Environmental Science Services Administration or of the Public Health Service who is serving with the Navy or Marine Corps shall be treated as if he were a member of that armed force.

(g) In any case where the amount to be paid is not more than $5,000, the authority contained in subsection (a) may be delegated

to any officer of an armed force under the jurisdiction of the department concerned, subject to appeal to the Secretary concerned, or his designee, for that purpose.

(h) Under such regulations as the Secretary of Defense may prescribe, he or his designee has the same authority as the Secretary of a military department under this section with respect to the settlement of claims based on damage, loss, personal injury, or death caused by a civilian officer or employee of the Department of Defense acting within the scope of his employment or otherwise incident to noncombat activities of that department."

2) Foreign Claims Act, Title 10, U.S.C., §2734:

"(a) To promote and maintain friendly relations through the prompt settlement of meritorious claims, the Secretary concerned or any officer designated by him may, under such regulations as the Secretary may prescribe, appoint one or more claims commissions, each composed of one or more commissioned officers of the armed forces, to settle and pay any claim for not more than $25,000 for —

(1) damage to, or loss of, real property of any foreign country or of any political

subdivision or inhabitant of a foreign country, including damage or loss incident to use and occupancy;

(2) damage to, or loss of, personal property of any foreign country or of any political subdivision or inhabitant of a foreign country, including property bailed to the United States; or

(3) personal injury to, or death of, any inhabitant of a foreign country;

if the damage, loss, personal injury, or death occurs outside the United States, or the Territories, Commonwealths, or possessions, and is caused by, or is otherwise incident to noncombat activities of, the armed forces under his jurisdiction, or is caused by a member thereof or by a civilian employee of the military department concerned or the Coast Guard, as the case may be. The claim of an insured, but not that of a subrogee, may be considered under this subsection. In this section, 'foreign country' includes any place under the jurisdiction of the United States in a foreign country. An officer may serve on a claims commission under the jurisdiction of another armed force only with the consent of the Secretary of his department, or his designee, but shall perform his duties under regulations of the department appointing the commission.

* * * *

(h) The Secretary of Defense may designate any claims commission appointed under subsection (a) to pay, as provided in this section, claims for damage caused by a civilian employee of the Department of Defense other than an employee of a military department. Payments of claims under this subsection shall be made from appropriations available to the Office of the Secretary of Defense for the payment of claims.

3) Title 10, U.S.C., §2731:

"In this chapter, 'settle' means consider, ascertain, adjust, determine, and dispose of a claim, whether by full or partial allowance or disallowance."

4) Title 10, U.S.C., §2735:

Notwithstanding any other provision of law, the settlement of a claim under section 2733, 2734, 2734a, 2734b, or 2737 of this title is final and conclusive."

5) Title 28, U.S.C., §1331:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no

such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff."

6) Title 28, U.S.C., §2672:

The pertinent text shall be set forth in the appendix at A-18.

7) Administrative Procedure Act, Title 5, U.S.C., §702:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

8) Fifth Amendment to the U.S. Constitution:

> No person shall be . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The petitioner, Paul E. Towry (Towry), retired from the U.S. Army with the rank of Colonel on August 1, 1969, after twenty-eight (28) years of service with the Armed Services. Following retirement, Colonel Towry continued to reside in Okinawa, Japan, since his wife was employed there as a school teacher for the United States Department of Defense. On January 1, 1972, Towry, at age 53, was transported from his home to a United States Army Hospital in Okinawa, because it was feared that he had suffered a heart attack. While en route to the hospital, the U.S. Army ambulance in which he was being transported veered off the road and went over a sixty-five foot cliff.

As a result of this accident, Colonel Towry sustained very severe injuries which necessitated initial hospitalization for twenty-six days and prolonged medical treatment thereafter. Petitioner continues to suffer severe pain and is twenty (20%) percent permanently disabled as a result of this incident.

On December 26, 1973, Colonel Towry filed claim for damages seeking compensation for injuries sustained as a result of the negligence of the government; the liability of the government is undisputed. The petitioner, as a civilian who was injured in foreign territory, lodged his claim pursuant to the Military Claims Act and the Foreign Claims Act, 10 U.S.C. §§2733 and 2734, and furnished the Secretary of the Air Force with factual and legal support for compensation in excess of $250,000 for his injuries.* The Secretary, acting as the statutory agent of the Department of Defense, rendered a decision recommending the award of $50,000 to Towry as recompense for the government's admitted negligence.

The quantum tendered by the Secretary was clearly inadequate under law. The applicable jurisprudence submitted by Towry plainly shows that his injuries should have been evaluated at more than five times the figure reached by the agency. See, *e.g.*, *Daigle v. Lang*, 377 So.2d 1384 (La.App. 1979); *Polmon v. Mohasco Corp.*, 371 So.2d 838 (La. App. 1979). Moreover, the agency refused to provide Towry with reasons for its decision, and despite the numerous cases cited by Towry to the agency clearly supporting the quantum sought by petitioner, the agency did not refer to a single decision in support of its determination.

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* Although this action is based on the negligence of the government, Petitioner could not file a claim under the Federal Tort Claims Act 28 U.S.C. §2671 *et seq.*, because the accident occurred outside of the territorial United States.

The petitioner rejected this administrative ruling, inasmuch as it constituted an abuse of discretion by the Secretary, and was unsupported by substantial evidence, in violation of the due process clause of the Fifth Amendment to the United States Constitution. The tender of the agency's legally inadequate offer was accompanied by a caveat that the $50,000 would be withdrawn if Towry sought judicial review. Such a carrot and stick approach by the government clearly violates the due process guarantees of petitioner and reveals the capricious approach taken by the agency in evaluating Towry's claim. Only after direct questioning by a member of the Fifth Circuit panel who expressed concern during oral argument about this unveiled governmental threat directed to petitioner did the government modify its position and subsequently indicate by written response to the circuit court that the offer may still be available. In this same May 14, 1980 letter from the government to the Court of Appeals, the government remarkably conceded that this type of a threat to avoid judicial review is an "administrative procedure." (A copy of the government's letter to the circuit court is reproduced at page A-20 of petitioner's appendix). Despite the agency's lack of reasons for its decision and despite the absence of any legal support for the agency's decision, the Fifth Circuit ostensibly inferred that the agency was not arbitrary in its action since the government has indicated

that its original offer to the petitioner may still be "open."*

Having exhausted his administrative remedies, petitioner turned to the judiciary as an impartial authority which could grant relief from improper agency action. Towry filed suit on September 27, 1976, seeking judicial review of the arbitrary administrative decision. In the initial complaint, jurisdiction was predicated upon the Administrative Procedure Act, 5 U.S.C. §§701 *et seq.* (hereinafter cited as the APA) and a federal question, 28 U.S.C. §1331.

On March 7, 1977, defendants filed a motion to dismiss for failure to state a claim upon which relief could be granted and for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure. The motion to dismiss was referred to a United States Magistrate for handling. Before the Magistrate heard defendants' motion to dismiss, Towry amended his complaint to assert that the government's action in considering his claim violated his constitutional guarantees provided by the United States Constitution.

The Magistrate's report, issued on July 21, 1977, suggested that the APA did not provide an independent

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* The possible availability of this inadequate offer by the government, however, skirts the true issue of whether the government acted arbitrarily and in violation of petitioner's fundamental due process rights, thereby entitling petitioner to judicial review.

grant of federal jurisdiction as a result of this Court's ruling in *Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980 (1977). (The Magistrate's report is reproduced in the appendix at A-22). However, the Magistrate recommended that the petitioner be permitted to go forward on his claim under 28 U.S.C. §1331, since the Magistrate found that neither §2733 nor §2734 of Title 10, United States Code, precluded judicial review of the arbitrary administrative actions taken on Colonel Towry's claim. The government elected not to appeal the Magistrate's decision.

The government subsequently filed another motion to dismiss. The district judge granted defendants' motion and dismissed all of petitioner's claims. The trial court held that the Military Claims Act and the Foreign Claims Act statutorily precluded judicial review, and were therefore exceptions to the judicial review provisions of the Administrative Procedure Act. Under this interpretation of the Military and Foreign Claims Acts, federal courts would not have jurisdiction to review even the most capricious administrative decisions. The lower court also found that maintenance of the suit was barred by the defense of sovereign immunity, and that the government had not infringed upon Colonel Towry's constitutional rights under the due process clause of the Fifth Amendment to the United States Constitution.

Petitioner filed a timely appeal to the Court of Appeals for the Fifth Circuit. On July 3, 1980, that

court affirmed the judgment of dismissal on the basis of the district court's opinion and on the basis that the original agency offer may still be available. Thereafter, petitioner filed a timely application for a writ of certiorari to issue from this Court to the Fifth Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. The Lower Courts' Interpretations Of 10 U.S.C. §2733 and §2734 Conflict With The Decisions Of Other Federal Courts And Are Inconsistent With Established Doctrine, Public Policy And Congressional Expression.

This case of first impression presents a most important issue for this Court's consideration, viz: whether Congress, in enacting 10 U.S.C. §§2733 and 2734, intended to preclude *all* administrative decisions made pursuant to those Acts from judicial review. The district court's opinion, which was accepted without reason by the court of appeal, concluded that the following language in 10 U.S.C. §2735, read in conjunction with 10 U.S.C. §2731, precluded judicial review of the Secretary's decision:

> Notwithstanding any other provision of law, the settlement of a claim under sections 2733 and 2734 . . . of this title is final and conclusive.

Section 2731 of Title 10 provides as follows:

> In this chapter, 'settle' means consider, ascertain, adjust, determine, and dispose of a claim, whether by full or partial allowance or by disallowance.

The district court relied on these two statutes to conclude that the Secretary's offer to petitioner was a "final and conclusive settlement" in the sense that it could not be subjected to scrutiny by the federal courts, even if the agency acted arbitrarily, capriciously and in total disregard of the applicable law. The lower court's interpretation of these statutes conflicts with other federal court rulings and is incongruous with established doctrine, public policy and legislative intent.

The Court in *Welsh v. United States*, 446 F.Supp. 75 (D.Conn. 1978), *aff'd*, ____ F.2d ____ (2nd Cir. 1978), correctly analyzed the right of judicial review with respect to the statutes *sub judice*. In *Welsh*, the Court considered and rejected the government's contention that these statutes bar judicial review. Rather, the Court found that the language of 10 U.S.C. §2735, providing that the settlement of a claim shall be "final and conclusive", does not preclude judicial review of a claim filed under the Military Claims Act. By carefully examining the legislative history of the Act, the Court noted:

> that the purpose of the final and conclusive language in §2735 is to prevent federal exec-

> utive agencies and officials. . . from reviewing and possibly rejecting the settlements of MCA [Military Claims Act] claims. Under this view, *Congress, in enacting §2735, was not precluding judicial review of agency construction and application of law, but only making the settlements of MCA claims final with respect to administrative review.*

Welsh v. United States, 466 F.Supp. at 78. (emphasis supplied).

In reaching its decision, the Court in *Welsh* also relied on this Court's decisions in *Shaughnessy v. Pedreiro*, 349 U.S. 48, 75 S.Ct. 591, 99 L.Ed. 868 (1955), and *Harmon v. Brucker*, 355 U.S. 579, 78 S.Ct. 433, 2 L.Ed.2d 503 (1958). In both of these cases, agency action deemed "final" was found to be subject to judicial review. In *Harmon*, this Court reviewed the validity of a less-than-honorable discharge from the army in spite of the relevant statute which made the order "final subject only to review by the Secretary of the Army." This Court then concluded that where agency "inaction or action turns on a mistake of law, then judicial relief is often available." Since the agency's determination is erroneous as a matter of law, the trial court committed reversible error by denying judicial review to petitioner. *Accord, Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 318, 78 S.Ct. 752, 757, 2 L.Ed.2d 788 (1958). Although the district court below did not have the reported decision of *Welsh* available at the time of its ruling, the court of

appeals chose not to follow the sound rationale of *Welsh* or *Shaughnessy* and its progeny.

The juridical interpretation of the Military Claims Act in *Welsh* is consistent with the Act's legislative history and the strong jurisprudential presumption in favor of review of agency action. An examination of congressional and judicial actions over the past thirty years reveals that the Fifth Circuit's holding in this case is not only out of step with the case law, but that it also does violence to the whole spirit and purpose of the statutes under review in this case.

Congress met the initial surge in growth of the executive branch with the passage in 1946 of the Administrative Procedure Act, 5 U.S.C. §§701, *et seq.* (APA). The APA included a judicial review provision which guaranteed access to the judicial branch for "persons aggrieved" by agency action. The legislative branch perceived that an individual's rights and interests might be severely damaged or lost entirely if an agency, charged with certain objectives of its own which are often in competition with those individual rights and interests, was granted absolute power to decide questions adversely affecting an individual. It was with this in mind that Congress enacted the APA, granting individuals the right of appeal to an impartial authority — the judiciary.

This checks and balance policy has evolved into a legal presumption of reviewability of federal agency

determinations. This presumption is rebutted only by "clear and convincing" evidence of a contrary legislative intent. See, *e.g., Rusk v. Cort*, 369 U.S. 367, 380, 7 L.Ed.2d 809, 817, 82 S.Ct. 787 (1962). As this Court stated in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-141, 18 L.Ed.2d 681, 87 S.Ct. 1507 (1967):

> . . . Judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress. [citations omitted].

This overriding presumption of reviewability has become firmly entrenched in appellate decisions, and it is routinely held that only upon the strongest showing of Congressional intent by clear and convincing evidence, as reflected not merely in particular provisions but in the legislative scheme as a whole, will relief be denied. *Standard Oil of California v. F.T.C.*, 596 F.2d 1381 (9th Cir. 1979); *Jaimez - Revolla v. Bell*, 598 F.2d 243 (D.C. Cir. 1979); *Local 2855 AFGE (AFL-CIO) v. United States*, 602 F.2d 574 (3rd Cir. 1979). *Cf. Salk v. Weinraub*, 390 N.E.2d 995 (Ind. 1979). While the language of section 2735 of the Military Claims Act appears at first blush to preclude judicial review, the Senate Report, which discusses the purpose of this section, cogently establishes that Congress did *not* intend to preclude judicial review. Rather, Congress merely sought to prevent "other agencies of the government from reviewing and reversing actions on claim settlements of agencies

specifically authorized to settle and pay certain claims." 1972 U.S. Code Cong. and Admin. News, at pp. 3109-10. *Cf.* FTCA, 28 U.S.C. §2672 where Congress made administrative adjustment of claims final on "all officers of the Government."

Congress reaffirmed this position when, in 1976, it amended §702 of the APA, and stressed once again by legislative act the importance of judicial review. Of particular import are the legislative comments, such as the congressional report found at 1976 U.S.C.C. & A.N., p. 6130:

> As Government programs grow, and agency activities continue to pervade every aspect of life, judicial review of the administrative actions of government officials becomes more and more important. Only if citizens are provided with access to judicial remedies against Government officials and agencies will we realize a government truly under law.

Neither the text of the Acts involved herein nor the legislative history reflect a congressional intent to preclude judicial review. Neither the district court nor the circuit court considered the significance of this legislative history warranting judicial review of petitioner's claim.

An ancillary corrollary in considering the reviewability issue is that the burden of proving nonreview-

ability must be borne by the agency involved. See, *Dunlop v. Bachouski*, 421 U.S. 560, 95 S.Ct. 1851 (1975); *Abbott Laboratories v. Gardner, supra.* The agency in this case totally failed to meet its burden that judicial review has been precluded by statute; in fact, the government did not even attempt to satisfy its affirmative burden of establishing that judicial review is not available to petitioner.

If the judgment of the Fifth Circuit Court of Appeals is allowed to stand, it will frustrate the legislative intent behind passage of the Military Claims and Foreign Claims Acts, not only with respect to the petitioner, but with respect to every citizen whose rights are lost to arbitrary agency action under those Acts. Moreover, since the lower courts in this case reached the exact opposite conclusion of other federal courts examining the same question of reviewability, it will result in unequal application of the laws.

It is for these reasons that petitioner respectfully prays that a writ of certiorari issue to review and reverse the judgment of the court of appeals.

II. The Decision Of The Lower Court Raises Serious And Recurring Problems Concerning The Due Process Clause Of The Fifth Amendment To The United States Constitution.

The decision of the Court of Appeals for the Fifth Circuit deprives Colonel Towry and all other petition-

ers who bring their claims under 10 U.S.C. §§2733 and 2734 of the safeguards of due process of law as guaranteed by the Fifth Amendment to the United States Constitution. These statutes, as interpreted by the circuit court, would allow the government to arbitrarily deprive such petitioners of valuable property interest, while denying them all recourse to the judiciary. This is inconsistent with one of the most basic principles of the American legal system: "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 163 (1803).

The government has argued that any grant to the petitioner under 10 U.S.C. §2733 is a gratuity, which can be withheld at whim. Pretermitting the patent error of the government's contention under the case law, such an argument misses the true issue of the instant case.

The Military Claims Act and the Foreign Claims Act (10 U.S.C. §§2731-2735) clearly mandate the Secretary of Defense to give all claimants under those Acts a fair hearing and to correctly apply the law in evaluating their claims. Section 2731 provides that:

> In this chapter, "settle" means consider, ascertain, adjust, determine, and dispose of a claim, whether by full or partial allowance or disallowance.

The notions of such terms as consideration and determination necessarily embody the presumption that the agency official will examine and act upon an individual's claim fairly and justly. Nor is it clear how the agency can "ascertain" damages if the agency, such as happened in this case, refuses to adhere to governing substantive law as developed within the forum state.

The statutes at bar thus have a two-fold effect. First, Congress has mandated the Secretary of Defense to act as its statutory agent in determining the legal extent of a claimant's damages. Congress empowered the Secretary to satisfy claims up to $25,000 and required the Secretary to report legal damages in excess of that amount to the Congress for its consideration and ultimate disposition. Through these statutes, Congress created a duty on the part of the Secretary of Defense to report accurately the extent of a claimant's damages.

Second, the statutes have a more subtle but no less potent constitutional effect. Through this Act, Congress created a legitimate expectation on the part of claimants that their claims would be weighed according to law. The statutes secured to them the benefits of a fair hearing, the protection of the law, and entitled them to claim the same. It is well established that when an independent source of law establishes certain benefits for the citizenry and supports that citizen's claim of entitlement to those benefits, the law creates a property interest which is protected by the due process

clause of the Fifth Amendment. *Roth v. Board of Regents*, 408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972).

The arbitrary and capricious action of the Secretary of Air Force deprived the petitioner of a valuable property interest, namely, his right to a fair assessment of his legal damages under the Military Claims Act. Nor can there be any doubt that the Secretary's actions violated due process of law. This Court has held that where a legal injury is of an economic character, the rule is that, when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. *Albemarle Paper Company v. Joseph Moody*, 422 U.S. 405, 45 L.Ed.2d 280, 95 S.Ct. 2362 (1975). Yet the quantum tendered by the Secretary was clearly inadequate under law, as the jurisprudence submitted by petitioner plainly shows that his claim should have been evaluated at more than five times the figure arbitrarily reached by the agency. Moreover, the agency refused to provide Towry with the reasons for its decision, and, despite the numerous cases cited by petitioner to the agency, the agency did not refer to a single case in reaching its decision. The federal courts have repeatedly held that decisions unsupported by evidence violate due process. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *U.S. Ex Rel Fong Foo v. Shaugnessy*, 234 F.2d 715 (2d Cir. 1955).

If the decision of the Court of Appeals is allowed to stand, it will deprive the petitioner and all others who bring their claims under 10 U.S.C. §§2733 and 2734 of a

crucial safeguard of their constitutional rights. The statutes in question allow judicial review of errors of law and the Constitution requires it. Congress has given the petitioner and all others in his position the right to a fair hearing and an accurate assessment of their claims. An executive agency cannot claim the power to deprive such persons of this valuable right without due process of law. Hence, it is respectfully submitted that this Court should grant certiorari in order to review the plainly erroneous ruling of the circuit court.

CONCLUSION

Judicial review of claims under the Military Claims Act and the Foreign Claims Act is not precluded by statute; to the contrary, there is nothing in either of these Acts that prohibits judicial review of errors of law. The case law imposes the burden on the government when the government seeks to prevent judicial review of a government administrative decision; the government (respondent herein) has failed to meet this requisite burden in order to avoid judicial review of the agency's action. It is respectfully submitted that petitioner is entitled to judicial review of a legally erroneous ruling.

For these reasons, a writ of certiorari should issue to review the erroneous judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted:

PHELPS, DUNBAR, MARKS,
CLAVERIE & SIMS

HARRY S. REDMON, JR.
Attorney of Record for
Petitioners

HARRY A. ROSENBERG

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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I do hereby certify that I have on this ____day of September, 1980, served a copy of the foregoing Petition for Writ of Certiorari on the U.S. Attorney for the Eastern District of Louisiana, 500 Camp Street, New Orleans, Louisiana, 70130; a copy on Leonard Avery, Esq., Assistant U.S. Attorney for the Eastern District of Louisiana, 500 Camp Street, New Orleans, Louisiana, 70130; and three copies on the Solicitor General, Department of Justice, Washington, D.C. 20530, by mailing same by U.S. Mail, properly addressed and first class postage prepaid.

I further certify that all parties required to be served have been served.

HARRY A. ROSENBERG

APPENDIX

Col. Paul Emmett TOWRY

versus CA No. 76-2967

The UNITED STATES of America,
Donald H. Rumsfeld,
United States Secretary of Defense
and Thomas C. Reed,
United States Secretary of the Air Force

United States District Court
for the Eastern District of Louisiana

July 31, 1978

MEMORANDUM OPINION

EDWARD J. BOYLE, Sr., District Judge.

According to the complaint filed herein, Col. Paul Emmett Towry, United States Army, retired, was "living temporarily" in Okinawa in 1972. On January 1, 1972, a military ambulance which was transporting Col. Towry to an Army hospital following a suspected heart attack, veered off the road and over a 65-foot cliff. Based on injuries allegedly sustained, Col. Towry filed a claim for damages in the amount of $375,000.00 with the Secretary of Defense under the Military

Claims Act, 10 U.S.C. §2733, "and/or" the Foreign Claims Act, 10 U.S.C. §2734.[1]

The Military Claims Act empowers the "Secretary concerned" to "settle and pay" a meritorious claim in an amount not greater than $25,000.00 and, if he considers that a claim in excess of $25,000.00 is meritorious, to "report the excess to Congress for its consideration."[2] Similar provisions are contained in the Foreign Claims Act, with the distinction that the Secretary concerned is authorized to "certify [an excess claim which he considers meritorious] to Congress as a legal claim for payment from appropriations made by Congress therefor."[3] In April of 1976, Col. Towry was informed that the Secretary of the Air Force (the Secretary), to whom responsibility for resolution of the claim had been assigned, made a final determination that Col. Towry should be offered a maximum of $50,000.00.

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1 The Foreign Claims Act, by its terms, applies to claims for "personal injury . . . to any inhabitant of a foreign country." 10 U.S.C. §2734(a)(3). The Act's scope of coverage, according to a regulation promulgated under the authority of 10 U.S.C. §2734(a), includes "U.S. Citizens . . . who actually inhabit the foreign country in which the claim arises." 32 CFR 842.50. The Military Claims Act does not cover claims cognizable under the Foreign Claims Act. 10 U.S.C. §2733(b)(2). The conclusion we reach herein makes it unnecessary to identify the statute which covers Col. Towry's claim.

2 *See* 10 U.S.C. §2733(a)(3) and (d).

3 *See* 10 U.S.C. §2734(a)(3) and (d).

Col. Towry rejected the offer and, averring that "the final determination of the Secretary was not in accordance with law," instituted this action seeking judicial review of the suggested administrative disposition of his claim. Named as defendants are the United States of America, United States Secretary of Defense Donald H. Rumsfeld, and United States Secretary of the Air Force Thomas C. Reed. The complaint prays for judgment in favor of the plaintiff and against the defendants in the amount of $375,000.00 and "for all such additional relief as the law, equity and the nature of the case may present." Jurisdiction was pleaded under the Administrative Procedure Act (APA), 5 U.S.C. §§701 *et seq.*, and the federal question statute, 28 U.S.C. §1331(a).

The defendants filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The motion was referred to a United States Magistrate pursuant to 28 U.S.C. §636(b)(1)(B) for hearing, report and recommendation. On report, the Magistrate recommended that "the motion of defendant, United States of America, to dismiss for lack of jurisdiction under Rule 12(b)(1 & 6) be granted," (based on a conclusion that the APA did not provide a jurisdictional predicate for this action), but also recommended "reserving plaintiff's claim pursuant to 28 U.S.C. §1331" (based on a conclusion that neither 10 U.S.C. §2733 nor 10 U.S.C. §2734 nor jurisdictional

interpretation thereof specifically precludes plaintiff from urging his claim in federal court if jurisdiction is otherwise present).

The report, however, does not reflect consideration by the Magistrate of the defendants' contention that maintenance of this action is prohibited by the doctrine of sovereign immunity and the "military" and "gratuitous" nature of awards made under the claims statutes involved in this litigation. Additionally, the report does not address the controversy between the parties as to whether or not the APA authorizes the judicial review and relief requested herein.[4]

Neither the plaintiff nor the defendants filed objections to the Magistrate's report, a procedure made available to them by 28 U.S.C. §636(b)(1)(C). However, the defendants have filed a subsequent motion to dismiss, urging the court to "enter a judgment dismissing plaintiff's action with prejudice and without reservation of any claim pursuant to 28 U.S.C. §1331.[5]

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4 For purposes of the contentions and controversy outlined in this paragraph, the defendants expressed their willingness to concede that jurisdiction under 28 U.S.C. §1331 would be "supportive of" judicial review authorized by the APA. *See* Record Doc. #13.

5 In the subsequent motion, the arguments advanced by the defendants in their original motion were re-urged, augmented by a contention that plaintiff failed to satisfy the APA's standing requirement contained in 5 U.S.C. §702, and presented under the broad assertion that plaintiff failed to identify a provision of federal constitutional or statutory law which his right to review could be said to "arise under" for purposes of §1331 jurisdiction.

Following a hearing, we took the motion under submission. At a conference held on a later date, the parties were directed to submit additional memoranda on various points relating to the submitted matter and on the additional issue of the extent and nature of any judicial review of the final agency determination which may be found appropriate. Further, counsel agreed that the administrative record should be submitted to the court for its reference.

All material was received in accordance with the submission schedule fixed at the conference. Because of the failure of the Magistrate to treat with what we perceive to be major issues raised in the defendants' original motion to dismiss, we consider the merits of that motion *de novo* along with the subsequent motion of the defendants. Thus, our deliberations included consideration of the memoranda submitted in support of and in opposition to both motions.

As noted by the Magistrate, *Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 985, 51 L.Ed.2d 192 (1977), precludes reliance on the APA as an independent jurisdictional basis for this action. Additionally, we have concluded that, because of the sovereign immunity of the United States, this court is without jurisdiction to grant an award of money damages against the defendants. Further, we find that judicial review of the final agency action which forms the basis of this litigation is statutorily precluded; thus, 28 U.S.C. §1331(a), as

amended in 1976, does not contain a grant of subject matter jurisdiction over this cause.

As noted by the Fifth Circuit in *Simons v. Vinson*, 394 F.2d 732 (5 Cir. 1968), *cert. denied* 393 U.S. 968, 89 S.Ct. 398, 21 L.Ed.2d 379, "Probably no principle of law is better established than that the United States may not be sued without its consent." *Id.* at 735-36.[6] In an amendment to the APA, effected by Pub.L. 94-574, 90 Stat. 2721, enacted October 21, 1976, Congress consented to suits by parties challenging the lawfulness of administrative action seeking equitable relief therefrom; however, it explicitly withheld its consent to suits for judicial review of federal action wherein monetary relief is sought.[7] Absent congressional con-

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6 For this principle, the court cited *Louisiana v. McAdoo*, 234 U.S. 627, 34 S.Ct. 938, 58 S.Ct. 1506 (1914); *Dugan v. Rank*, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963); *Malone v. Bowdoin*, 369 U.S. 643, 82 S.Ct. 980, 8 L.Ed.2d 168 (1962); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949).

7 The law adds to the original one-sentence text of 5 U.S.C. §702, which provides,

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

three additional sentences, the first of which reads:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

sent, this court is without jurisdiction to entertain plaintiff's claim for monetary relief against the United States.

The immunity of the sovereign, which extends to the agencies of the federal government and the officers of those agencies,[8] prevents maintenance of this action for monetary relief against the Secretaries of Defense and Air Force as well. Resort by the plaintiff to the principle that sovereign immunity does not apply to suits against individual federal officials for their assertedly *ultra vires* or unconstitutional actions is foreclosed by the nature of the relief sought, i.e., an award of tort damages which could only be satisfied from the public treasury and would thus require the "disposition of unquestionably sovereign property."[9]

Further, we find no merit in plaintiff's contention that either the Military Claims Act or the Foreign Claims Act may be considered, by analogy to the Federal Tort Claims Act, as having created a "right of action" in the plaintiff to judicially pursue a personal injury tort claim against the United States or the federal

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8 *Simons v. Vinson, supra,* at 736.

9 *Larson v. Domestic & Foreign Commerce Corp., supra,* 337 U.S. at 691, n.11, 69 S.Ct. at 1462, n.11. *See Saine v. Hospital Authority,* 502 F.2d 1033, 1035-1036 (5 Cir. 1974), *citing Zapata v. Smith,* 437 F.2d 1024 (5 Cir. 1971). *Cf. De Lao v. Califano,* 560 F.2d 1384, 1389-91 (9 Cir. 1977); *Edelman v. Jordan,* 415 U.S. 651, 668, 94 S.Ct. 1347, 1358, 39 L.Ed.2d 662 (1977) (discussing the Eleventh Amendment immunity afforded the various States).

officers named herein.[10] *Ford v. United States*, 88 F.Supp. 263, 264, 115 Ct.Cl. 793 (1950) lends the plaintiff no support in this assertion.

In oral argument and in a memoranda addressed to this court, the plaintiff noted that he not only has prayed for a money judgment but also seeks all additional relief as the law, equity and the nature of the case may require. "The Court may decide," he suggests, "to remand the case to the administrative agency for further consideration with appropriate instructions . . . and may fashion other relief in its equitable powers."

Such an exercise of equitable powers is sought by the plaintiff to rectify what he has alleged in the complaint to be "a final determination of the Secretary [which] was not in accordance with law." The complaint's specific allegations include averments that the administrative decision was "arbitrarily conceived," "capricious" and "unsupported by the evidence" and that the Secretary abused the discretion vested in him by the Military and Foreign Claims Acts. Although we have been referred to no formal findings which the Secretary may have made, that portion of the administrative record which was forwarded to the court with a supplemental memoranda of the defendants further identifies the source of Col. Towry's dissatisfaction. It is apparent therein that the Secretary concluded that

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10 *See Bird & Sons, Inc. v. United States*, 420 F.2d 1051, 1057, 190 Ct.Cl. 426 (1970); *Preferred Ins. Co. v. United States*, 222 F.2d 942, 946 (9 Cir. 1955); *United States v. Wade*, 170 F.2d 298, 299 (1 Cir. 1948).

an award of approximately $37,500 would adequately compensate Col. Towry for past and future pain and suffering ($110,000 was requested) and that Col. Towry's asserted loss of income and impairment of earning capacity were speculative in nature ($111,005 was requested).[11] The equitable relief sought herein would require this court to reverse the Secretary's finding of these adjudicative facts.

Whether or not the objective reasonableness of an adjudicative fact finding by the Secretary under the Military Claims Act "and/or" the Foreign Claims Act is judicially reviewable is not, as the parties have assumed, subject to governance by the doctrine of sovereign immunity. The "classic exceptions" to this doctrine, therefore, also are inapplicable herein. As has been noted previously, Congress acted in 1976 to eliminate the defense of sovereign immunity as a barrier to actions seeking equitable relief from assertedly illegal Federal administrative action.[12] The House Report on

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11 *See* letter dated April 15, 1975, from Harry S. Redmon, Jr., Esq. to Col. William A. Martin, USAF, Chief, General and Tort Litigation Division, Office of the Judge Advocate General, Department of the Air Force, setting forth the amounts requested by elements of damage, and letter dated November 13, 1975, from Mr. Redmon to Col. Martin, wherein counsel for plaintiff provided Louisiana authorities (at the government's suggestion) relating to quantum in pain and suffering awards and standards of proof for loss of past and future income.

12 In its explicit abrogation of the defense of sovereign immunity in actions seeking equitable relief, the first new sentence of §702 replaces the law of this Circuit established in *Estrada v. Ahrens*, 296 F.2d 690, 698 (5 Cir. 1961), i.e., that the APA impliedly waives

S.800, which bill contained the various amendments to the APA discussed herein, reveals in the clearest terms the intent of Congress to effect the immediate discontinuance of the "totally erratic, haphazard, and unpredictable, unfair, inconsistent, and in some situations, unjust" judicial application of the doctrine of sovereign immunity to actions seeking equitable relief from agency action[13] To underscore its intent, Congress explicitly removed the barrier, formerly presented by sovereign immunity, to naming the United States in such actions.[14] The Committee on the Judi-

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the sovereign's immunity in actions to which the APA applies. In this connection, we also note that the dilemma faced by the court in *Warner v. Cox*, 487 F.2d 1301 (5 Cir. 1974) has been resolved statutorily by the addition of clause (2) of the third sentence added to §702 by the amending legislation of 1976 which reads: "Nothing herein . . . (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." *See* H.R.Rep. No. 94-1656, 94th Cong., 2d Sess. 11, 12-13 (1976), 5 U.S.Code Cong. and Admin.News, 1976 pp. 6121, 6131, 6133. However, contrary to an assertion of movants, *Warner v. Cox, supra*, is not dispositive of the motion *sub judice*. Movant's implied analogy between the Military and Foreign Claims Act and the Tucker Act must fail in light of the expressed limitation of the applicability of clause (2), quoted above, to statutes which grant "consent to suit."

13 *See* H.R.Rep. No. 94-1656, 94th Cong., 2d Sess. 4-9 (1976), 5 U.S.Code Cong. and Admin. News, 1976, pp. 6124-6129.

14 The second new sentence added to 5 U.S.C. §702 by Pub.L. 94-574 provides:

> The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States. . . .

Section 703 of Title 5, U.S.C., governing the issue of proper parties defendant, was also amended to provide the plaintiff with the

ciary, in favorably reporting S.800, stated: "Actions challenging official conduct are intrinsically against the United States and are now treated as such for all practical purposes."[15]

However, the House Report also contains a specific assurance that the elimination of the defense of sovereign immunity will not affect the operation of the exclusionary rules found in the APA itself.[16] The exclusion which makes the judicial review provisions of the APA inapplicable to the action *sub judice* is stated in 5 U.S.C. §701(a)(1), which provides:

> (a) This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review.[17]

As noted in *Macomber v. United States*, 335 F.Supp. 197, 198-99 (D.R.I. 1971), the "presumption of reviewability" of agency action which is illustrated by *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507,

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option of naming as defendant the United States, the agency by its official title, appropriate officers, or any combination of them in judicial review actions where no special statutory review proceeding is applicable.

15 H.R.Rep. No. 94-1656, 94th Cong., 2d Sess. 11 (1976), 5 U.S.Code Cong. and Admin. News, 1976, p. 6131.

16 H.R.Rep. No. 94-1656, 94th Cong., 2d Sess. 11 (1976), 5 U.S.Code Cong. and Admin. News, 1976, p. 6131.

17 Thus, we do not reach the exclusion contained in clause (2) of §701(a), for agency action "committed to agency discretion by law."

1510-1511, 18 L.Ed.2d 681 (1967) does not alter this exclusionary provision. Quoting *Barlow v. Collins*, 397 U.S. 159, 167, 90 S.Ct. 832, 838, 25 L.Ed.2d 192 (1970), the *Macomber* court observed: "A clear command of the statute will preclude review; and such a command of the statute may be inferred from its purpose."

Further, *Califano v. Sanders*, supra, 430 U.S. at 104-05, 97 S.Ct. at 984-85, instructs us that the retention by Congress of a statute precluding review of agency action qualifies the grant of federal question subject matter jurisdiction effected by the 1976 amendment to 28 U.S.C. §1331(a). Under the amendment, enacted in Pub.L. 94-574, which also contained the various additions to the APA discussed herein, the amount-in-controversy requirement was eliminated as a prerequisite to the maintenance of "any [1331] action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity." 28 U.S.C. §1331(a). "The obvious effect of this modification," the Court concluded, *"subject only to preclusion-of-review statutes created or retained by Congress,* is to confer jurisdiction on federal courts to review agency action . . . ." *Id.* 430 U.S. at 105, 97 S.Ct. at 984. (Emphasis ours.)

A clear command of Congress precluding review of administrative "fact findings" under the Military Claims Act and the Foreign Claims Act is contained in 10 U.S.C. §2735. As pertinent here, that statute provides:

> Notwithstanding any other provision of law, the settlement of a claim under section 2733 [and] 2734 . . . of this title is final and conclusive.

As we have noted, the "Secretary concerned" under the claims acts involved herein is authorized by the Military Claims Act to "report to Congress for its consideration" an excess claim if he "considers that a claim in excess of $25,000.00 is meritorious." Under the Foreign Claims Act, the "Secretary concerned" may "certify the excess to Congress as a legal claim for payment from appropriations made by Congress therefor," but, again, only if he "considers a claim in excess of $25,000.00 meritorious." As the concept of the Secretary's "consideration" is embodied within the definition of "settlement," 10 U.S.C. §2731, such "considerations" are established as final and conclusive under §2735. Further, the term "settle" encompasses the full or partial disallowance of the Secretary in the disposition of a claim.[18]

We are supported in our conclusion that §2735 precludes judicial review of factual agency determinations under the Military and Foreign Claims Acts by the legislative history of a 1972 amendment to section 2735. By Pub.L. 92-413, 86 Stat. 649, section 2735 was amended to extend its finality provisions to actions for

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18 10 U.S.C. §2731 provides: "In this chapter, 'settle' means consider, ascertain, adjust, determine, and dispose of a claim, whether by full or partial allowance or disallowance."

administrative settlement of military claims brought under §§2734a, 2734b and 2737. The Senate Report on the proposed amendment contains the following statement of policy:

> Under the present provisions of section 2735, finality of settlement applies to property and personal injury claims under sections 2733 and 2734 of title 10. Similar finality of settlement statutes include those applicable to Federal tort claims (28 U.S.C. 2672), admiralty claims involving the military departments (10 U.S.C. 4806, 7622(d), 7623(d), and 9806), and claims generated by National Guard activities (32 U.S.C. 715).[19] The proposed legislation would be consistent with the cited general policy of preventing other agencies of the Government from reviewing and reversing actions on claims settlements of agencies specifically authorized to settle and pay certain claims.

S.Rep. No. 92-1056, 92d Cong. 2d Sess. (1972), 2 U.S.Code Cong. and Admin.News, 1972, pp. 3106, 3109-3110.

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19 Sections 715(d), (g) and (h) of 32 U.S.C. authorize a federal official to report to Congress, for its consideration, a meritorious claim exceeding $25,000.00 which he considers meritorious, and provide that the "settlement" of a claim, which includes the concepts of consideration and disallowance, is final and conclusive.

In *Macomber v. United States*, supra, finality and definitional provisions contained in the Military Personnel and Civilian Employees' Claim Act of 1964, 31 U.S.C. §§240-243,[20] which are identical to those found in sections 2735 and 2731, were held to preclude judicial review over an administrative denial of a claim brought under that Act. There, the intent of Congress to preclude review was found not only in the language of the finality provision but also in a letter from the Assistant Secretary of the Interior to the Chairman of the Judiciary Committee which was affixed to the Senate Report covering the proposed 1964 legislation. The letter stated:

> No provision is made for appeal to the courts. On the contrary, the bill provides that the administrative settlement of a claim is final and conclusive.

Id. at 199.

There remains only the contention of the plaintiff that the due process clause of the Fifth Amendment of the United States Constitution requires review of all agency action which is alleged to be arbitrary, capricious, an abuse of discretion, and not based on substantial evidence. We have been cited to and have found no cases supporting this all-embracing proposition. In-

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20 The finality provision is 31 U.S.C. §242; definition of "settle" is stated in 31 U.S.C. §240(3).

stead, we are directed by *Califano v. Sanders*, supra, 430 U.S. at 106-108, 97 S.Ct. at 985-86, to honor the contours of federal question jurisdiction set out in preclusion-of-review statutes. In this connection, we note that the Court, there, did not classify a claim of an "abuse of agency discretion" by the Secretary of Health, Education and Welfare — in refusing to reopen a claim for social security benefits — as "one of those rare instances where the Secretary's denial of a petition to reopen is challenged on constitutional grounds." *Id.*, 97 S.Ct. at 986. Thus, the Court was not counselled against reading the no-review statute there involved, 42 U.S.C. §405(h), as taking what would otherwise be the " 'extraordinary' step of foreclosing jurisdiction." *Id.*

Additionally, even in the absence of an express prohibition of review, the availability of judicial review of agency action which involves an exercise of administrative discretion is to be determined by a number of factors, only one of which is the desire to safeguard individual rights.[21] The finality provision contained in 10 U.S.C. §2735 expresses the congressional determination, which we feel is sound, that this desire is outweighed by the disruptive effect which judicial review of fact findings would have on the prompt and authoritative administrative settlement of claims brought "against the military" under the Militarys Claims Act

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21 *See Langevin v. Chenango Court, Inc.*, 447 F.2d 296, 302-04 (2 Cir. 1971); *Hahn v. Gottlieb*, 430 F.2d 1243, 1249-51 (1 Cir. 1970).

and the Foreign Claims Act. The flexibility inherent in the concept of due process, itself requiring a balance between the nature of the private interest affected and the government interest involved,[22] is a means for accommodation of this determination.

Accordingly, the original motion of the defendants to dismiss the complaint was heretofore granted and their subsequent motion to adopt the recommendation of the Magistrate without the reservation suggested therein was denied for mootness.[23]

Col. Paul Emmett TOWRY,
Plaintiff-Appellant,

versus

The UNITED STATES of America,
Harold Brown, Secretary of Defense, et al.,
Defendants-Appellees.

No. 78-3082

United States Court of Appeals,
Fifth Circuit.

July 3, 1980.

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22 *See Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S.Ct. 893, 902-03, 47 L.Ed.2d 18 (1976).

23 See Minute Entry, June 30, 1978.

Appeal from the United States District Court for the Eastern District of Louisiana; Edward J. Boyle, Sr., Judge

Before TUTTLE, RANDALL and TATE, Circuit Judges.

PER CURIAM:

The judgment is affirmed on the basis of the district court's opinion, which is published at 459 F.Supp. 101 (E.D. La. 1978).

We were troubled by the suggestion at oral argument that payment of the amount determined by the Secretary of the Air Force as compensation for Col. Towry's injuries was conditioned upon his not seeking judicial review of the award. We have been informed by letter from the Acting Chief of the Claims and Tort Litigation Staff of the Office of the Judge Advocate General that the compensation award to which the Secretary of the Air Force determined Col. Towry was entitled is still open, and that Col. Towry may accept the tendered amount in satisfaction of his claim.

AFFIRMED.

28 U.S.C. §2672 provides:

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: *Provided,* That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in

excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

A-21

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON, D.C. 20324

May 14, 1980

Mr. John Volz
United States Attorney
ATTN: Mr. Leonard P. Avery
Hale Boggs Federal Building
500 Camp Street
New Orleans, Louisiana 70130

Dear Mr. Avery

Pursuant to our phone conversation of 14 May 1980, I have reviewed the administrative claim file of Colonel Towry and have copied the internal Memorandum Opinion, Action of the Secretary, and subsequent correspondence with Congressional personages and former President Gerald Ford.

It is quite possible that Colonel Towry was told that failure to accept the $50,000.00 offer in full and final settlement would result in withdrawal of the offer and denial of the claim. This is, however, an administrative procedure by which we can terminate negotiations or, occasionally, persuade a dilatory attorney or claimant to even acknowledge our offer. The "threat," if it can be called that, is used only after we have reached our upper limit.

I have determined that the $50,000.00 offer is "still open" and the Administrative Assistant to the Secretary of the Air Force has agreed. I must stress, however, that we do not intend to reopen negotiations with Colonel Towry or his attorney and that $50,000.00 is offered in full and final satisfaction of all claims arising out of Colonel Towry's ambulance accident on Okinawa.

Sincerely

/s/ JOE SEBESTA
JOE SEBESTA, Lt Colonel, USAF
Acting Chief
Claims and Tort Litigation Staff
Office of The Judge
Advocate General

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

COL. PAUL EMMETT TOWRY

versus CA No. 76-2967-D

THE UNITED STATES OF AMERICA

Filed: July 21, 1977

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE

This matter was referred to me as United States Magistrate for Report and Recommendation pursuant to 28 U.S.C. §636(b)(1)(B).

Defendant has filed a motion to dismiss for lack of jurisdiction. The motion was heard on May 25, 1977.

The plaintiff has filed this action under 10 U.S.C. §2733, the Military Claims Act, and 10 U.S.C. §2734, the Foreign Claims Act. Plaintiff alleges jurisdiction based on 5 U.S.C. §701 *et seq.*, the Administrative Procedure Act, and 28 U.S.C. §1331. Defendant in its motion to dismiss challenges jurisdiction based on 5 U.S.C. §701 *et seq.* Defendant does not challenge federal question jurisdiction under 28 U.S.C. §1331.

The primary issue to be considered is whether or not 5 U.S.C. §701 *et seq.*, the Administrative Procedure Act,

provides an independent grant of federal jurisdiction. The secondary issue is whether irrelevant of A.P.A. jurisdiction, the plaintiff is precluded from litigating his claim by either 10 U.S.C. §2733 or §2734.

The Supreme Court in *Califano v. Sanders*, 97 S.Ct. 980 (1977) held that the A.P.A. does not provide an *independent* grant of subject-matter jurisdiction.

Neither 10 U.S.C. §2733 nor §2734 by their terms or by cases interpreting them specifically preclude plaintiff from urging his claim in federal courts if he can found jurisdiction on some basis. See *Bird & Sons, Inc. v. United States*, 420 F.2d 1051 (Ct.Cl. 1970); *Arkwright Mutual Insurance Co. v. Bargain City, U.S.A., Inc.*, 251 F.Supp. 221 (E.D. Pa. 1966), aff'd 373 F.2d 701 (CA 3, 1967), cert. denied, 88 S.Ct. 63 (1967); *Lundeen v. Dept. of Labor & Industries*, 469 P.2d 886 (1970).

Recommendation

Accordingly, I recommend that the motion of defendant, UNITED STATES OF AMERICA, to dismiss for lack of jurisdiction under Rule 12b(1 & 6) be GRANTED, reserving plaintiff's claim pursuant to 28 U.S.C. §1331.

New Orleans, Louisiana, July 21, 1977.

/s/ KENNETH C. HUGHES
KENNETH C. HUGHES
UNITED STATES
MAGISTRATE